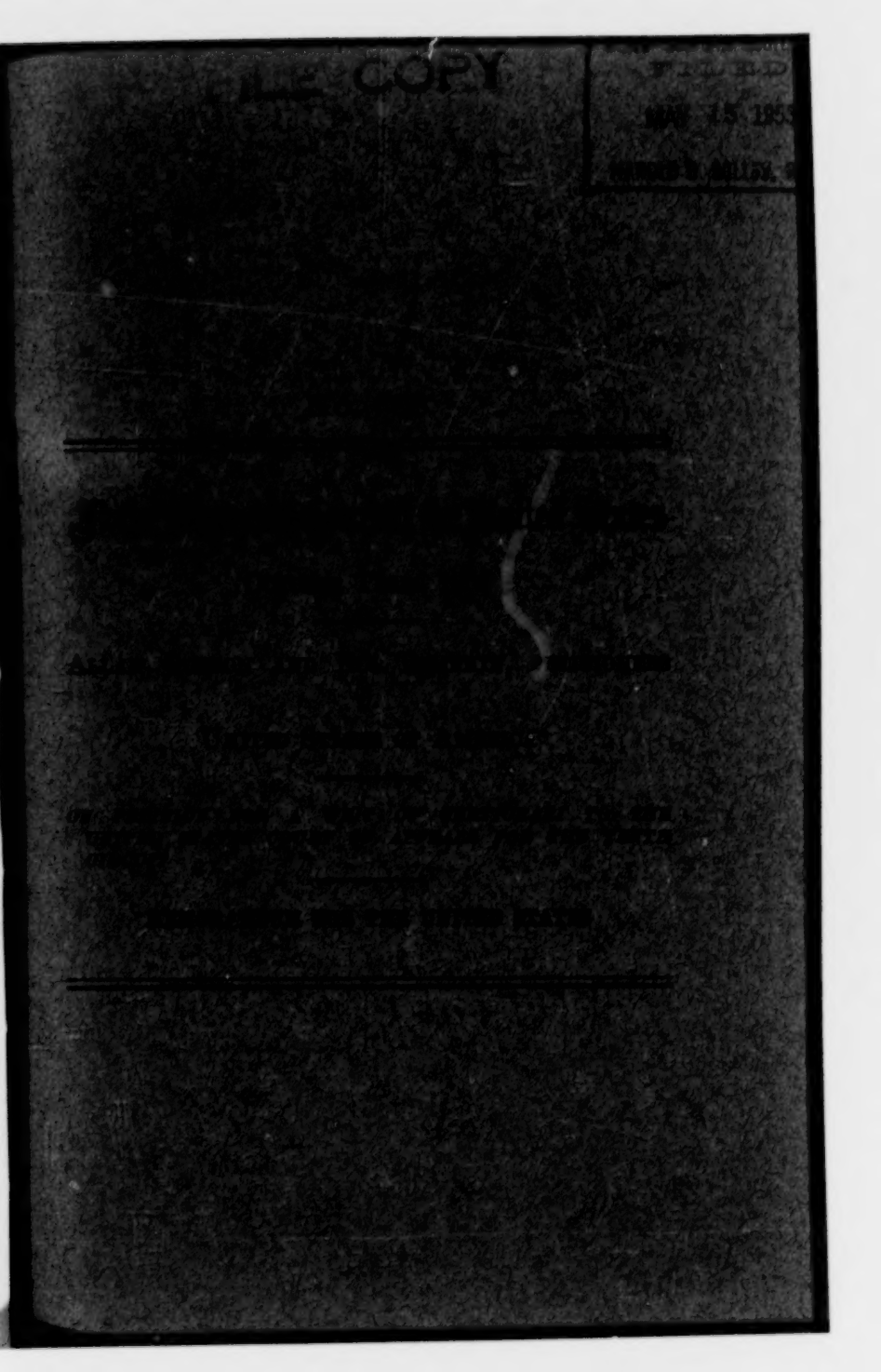

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 688

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 114–123) and dissenting opinions (R. 123–127) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 28, 1953 (R. 127–128). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether in a prosecution for wilful violations of consumer credit regulations in the installment

sales of sewing machines, the court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner owners of the business.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 10 *et seq.*

STATEMENT

Petitioners Gordon and Tempkin, together with Deverich, Stone, and Turner, were charged in the United States District Court for the District of Utah with violations of Sections 601 and 603 of the Defense Production Act of 1950 (64 Stat. 798, 812, 814) and Regulation W (51 F. Reg. 6118 as amended 15 F. Reg. 6931) promulgated thereunder (pp. 10–12, *infra*). The first count in the information charged that the two petitioners and Deverich and Stone, on March 21, 1951, made an instalment sale of a sewing machine to Buean E. Colley, and that on the delivery of this machine they unlawfully, knowingly, and wilfully accepted and received a down payment of less than 25 percent of the sale price (R. 3). The second count charged the same persons with unlawfully, knowingly, and wilfully failing to keep records showing the amount of the purchaser's down payment in the instalment sale of the machine to Buean E. Colley (R. 3–4). The third count charged that the two petitioners and Deverich, Stone, and Turner, on May 17, 1951, made an instalment sale of

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a sewing machine to Evelyn Allen and extended credit knowing that other credit had been extended therewith, so that the total amount of credit in connection with the sale exceeded 75 percent of the sale price (R. 4). The fourth count charged that the persons mentioned in count three conspired to violate Sections 601 and 603 of the Act and Regulation W by making the sale of the machine to Evelyn Allen as alleged in count three (R. 4–5).

The jury found all the defendants guilty as charged (R. 8). Petitioners were given concurrent sentences of imprisonment for one year and a $2,500 fine on each of the four counts, with nine months of the jail sentence suspended, and the fines suspended on all but one of the four counts (R. 10–11). On appeal (R. 13–14) their convictions were affirmed by a divided court (R. 127–128).[1]

The evidence may be summarized briefly as follows:

Petitioners Gordon and Tempkin were engaged in the business of selling new and used sewing machines as a partnership under the name of National Stores, first in Los Angeles and later in Salt Lake City, Utah, where the sales laid in the information were made (R. 17, 32, 79–80).

[1] The court below reversed the convictions of Deverich and Stone on the ground of insufficient evidence (R. 117–118, 123). Turner was given a suspended sentence, placed on probation, and did not appeal (R. 9).

An intensive newspaper and radio advertising campaign for low priced re-built sewing machines to be purchased on time stimulated sales. In most instances new and more expensive machines instead of the re-built models were sold, thereby increasing the salesmen's commissions. One salesman testified that he made about 50 sales, in about 80 percent of which he took "I. O. U.'s" for down payments; that these were turned into the company office and treated as cash as far as the company was concerned; and that he was paid the full amount of his commissions irrespective of the down payments. He testified that the management told the salesmen to procure the required 25 percent down payment, but to accept an "I. O. U." for it if they could not get it otherwise. (R. 29–30, 86, 87.)

Regarding the Colley sale forming the basis for counts one and two, one Tempkin made the sale at the company store. Colley paid $1.00 to hold the machine until his next payday when he brought in an additional $15.00 before taking the machine away. A Mr. Tempkin, in the presence of Mrs. Colley, signed on the date of the sale the conditional sale contract, showing the price as $152.95 with a stated down payment of $38.95, but the signature on the contract was obliterated. The receipt for the original $1.00 bore a signature "E. Tempkin." Colley later made additional payments of $4.00 and $3.00 on the down pay-

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ment to a female employee at the store, $23.00 being the total amount paid on the stated down payment of $38.95 (R. 31–38, 72, 103–104, 109). There were two Tempkins connected with the organization, the petitioner Eli and an Irving Tempkin (R. 73). The Government's evidence did not identify which of the Tempkins made this sale.

In the Allen sale forming the basis of counts three and four, the salesman Turner made the sale after bringing the machine to the purchaser's house. The conditional sale contract showed the price of $152.95 including tax, with a down payment of $38.95. The purchaser paid only $13.00 of this stated down payment, signed three "I. O. U.'s" for $6.50 each, and on subsequent dates mailed in envelopes addressed to the company, with the salesman's name on the inside, three money orders for $6.50 each. The obligation for the balance of the down payment was to the salesman alone. (R. 41–45, 70, 104.)

There was also evidence as to numerous other instalment sales of sewing machines to persons other than those named in the information, where less than the required 25 percent down payment was made at the time of the purchases (R. 46, 51, 52, 54–55, 56, 57, 64–65, 66, 68–69, 104, 105, 106).

Petitioner Gordon was the general manager, and gave talks at sales meetings at the Salt Lake City store. He resided in Los Angeles and vis-

ited the Salt Lake City store two or three times during 1951. (R. 29, 73.) Gordon identified company records showing proper down payments by purchasers, and the deposits of these in a Salt Lake City bank (R. 74–76, 106–107). Gordon denied instructing any company employees that they could waive the down payment required by Regulation W, and testified that he had no knowledge of any transactions where less than the down payment was required, until the time of a hearing before the Federal Reserve Board about such discrepancies (R. 78–79, 82). Gordon admitted that at the end of that hearing he stated: "Everything that isn't right has been discontinued" (R. 85).

DISCUSSION

All three judges in the court below agreed that, in the words of the dissenting judge, the "evidence is sufficient to sustain a conclusion that the partners had reason to know that the regulations were being violated by their employees" (R. 123–124). The basis of the dissent below and petitioners' principal contention in this Court is that the case was not submitted to the jury under proper instructions. This argument stems from the judge's charge that "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer," if the knowledge of the agent was obtained while engaged in the business of the employer in the scope of his employment (R. 92–

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93).[2] In the words of the majority below, "[w]hat the court did in effect was to make wilfulness an essential element of the offenses charged in the information, and to charge the employers [petitioners] with the guilty knowledge and acts of the employees in determining the question of wilfulness" (R. 121).

This is admittedly the standard applied in determining the criminal liability of corporations, even where, as here "wilfulness" is an element of the offense. *C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 89–90 (C. A. 9). It has not hitherto been applied to noncorporate owners where intent is an element of the crime.

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[2] Petitioners' other contentions are merely restatements of the same basic contention. They argue that, under the charge, a conviction for conspiracy was possible without proof that they had knowledge of the conspiracy (Pet. 13–14.) However, the court, after describing the offense of conspiracy (R. 95–96), stated:

"* * * that is a question * * * which the court submits to you for your determination under count 4, whether or not, as the court has defined the word 'conspire' to you, from all the facts and circumstances in this case you find that there was an agreement, or an understanding, or a scheme to violate the law of the United States; * * *"

Nevertheless, since the general instruction as to imputing knowledge preceded the discussion of the specific counts, it is possible that the jury could have thought that, under the instructions, the same general rule applied to all counts. We therefore agree that the case must stand or fall on the validity of this general instruction.

Similarly petitioners' attack on the sufficiency of the evidence (Pet. 14) is merely upon the use of the standard set forth in the charge as quoted above.

A corporation can act only through agents, and a corporation as such cannot go to jail. Insofar as individual liability is concerned, it is a general principle of criminal law that guilt is personal. Hence the rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise, approve, or ratify. *Lurding* v. *United States*, 179 F. 2d 419, 421 (C. A. 6); *Paschen* v. *United States*, 70 F. 2d 491, 503 (C. A. 7); *Nobile* v. *United States*, 284 Fed. 253 (C. A. 3); *United States* v. *Cohn*, 128 Fed. 615 (S. D. N. Y.); Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689.

There is a well-recognized exception to this rule for certain types of welfare legislation as to which intent is not an element of the offense. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Behrman*, 258 U. S. 280. Consumers' credit controls, such as are involved in the instant case, might well have fallen in this category if Congress had not limited the penal provision, which imposed sentences up to imprisonment for one year, to persons who "wilfully" violate. This requirement of wilfulness seems plainly to manifest a congressional intention that individual violators of the statute should not be punished in the absence of criminal intent. There is no doubt that "wilfully" as used in this type of statute means no more than that the act constituting the

violation must be knowingly and intentionally performed. *Cf. Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States,* 312 U. S. 335, 341. But while the word implies no evil motive, it does imply a *mens rea* which is essentially personal and individual. We therefore believe that it was error for the court below to affirm the conviction of petitioners on a charge which did not require that they have the intention to violate the law as described above.

CONCLUSION

There was ample evidence of petitioners' guilt. Since the charge to the jury was, in the opinion of both petitioners and respondent, improper for the reasons stated, the case may appropriately be disposed of summarily. The petition for certiorari should be granted and, if the Court agrees with these views, the judgment of the Court of Appeals vacated and the case remanded to the District Court for retrial.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY 1953.

APPENDIX

Statutes and Regulations Involved

The Defense Production Act of 1950, 64 Stat. 798, 812, 814, provides:

> Sec. 601. To assist in carrying out the objectives of this Act, the Board of Governors of the Federal Reserve is authorized * * * to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary * * *.
>
> * * * * *
>
> Sec. 603. Any person who willfully violates any provision of section 601 or 602 or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Part 222—Consumer Regulation W, September 8, 1950, 15 F. Reg. 6118, as amended October 16, 1950, 15 F. Reg. 6931, provides:

> § 222.2 *General requirements and registration—*
>
> (a) *General requirements.* Each person engaged in the business of making instalment sales * * * is referred to in this part as a "Registrant"; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him * * * except on the following conditions:

(1) He must have a license, and each Registrant is hereby granted such a license * * *.

(2) The credit extended * * * must comply with the applicable requirements of this part.

* * * * *

§ 222.3 *Instalment sales; general rules* * * *

(a) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (e) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

(b) *Amounts and intervals of instalments; record.* * * * The information specified in § 222.6 (e) shall be set forth in a bona fide record of any transaction subject to this section.

(c) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article * * *.

§ 222.6 *Certain technical provisions.* * * *

* * * * *

(e) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3 (b) shall set forth (in any order) the following information:

(1) A brief description identifying the article purchased;

(2) The cash price of the article;

(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating

the monetary value assigned thereto in good faith;

(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

(6) The terms of payment.

* * * * *

(i) *Side loan to make down payment.* A Registrant shall not extend any credit for financing the purchase of any listed article if he knows or has reason to know that there is, or that there is to be, any other credit of any kind extended in connection with the purchase of the listed article which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this part; but, if the Registrant accepts in good faith a written statement signed by the obligor that no such other credit exists or is to be extended, such statement shall be deemed to be correct for the purposes of the Registrant.

§ 222.9 *Supplement.*

Part 1. *Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used are "listed articles", and the following required down payments and maximum loan values are prescribed * * *

Group B—25 percent minimum down payment, 75 percent maximum loan value:

* * * * *

9. Sewing machines designed for household use.

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